

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Bruce Transportation Group, Inc. and General Financial Services
Application #3 W0058-1 -EB

CHAIR'S PRELIMINARY RULING

I. BACKGROUND

On October 15, 1996, Bruce Transportation Group, Inc. and General Financial Services ("Applicants") filed an application for an Act 250 permit with the District #3 Environmental Commission ("Commission") for the conversion of a previously-approved hair salon to an office and school bus terminal, and the construction of a 40-by-50 foot maintenance terminal with storage of 21 school buses during the summer and parking for ten school buses during the winter ("Project").

On November 15, 1996, the Commission convened a hearing regarding the Project. At the conclusion of the hearing, the Commission adjourned the hearing pending submission of additional information and deliberation.

On December 2, 1996, Shirely A. Wagner filed a letter with the Commission.

On January 23, 1997, Ms. Wagner filed a second letter with the Commission. This second letter is stamped as being exhibit #29 of the Application.

On February 13, 1997, the Commission adjourned the hearing and issued Land Use Permit #3W0058-1 ("Permit") and Re: Bruce Transportation Group, Inc. and General Financial Services, #3 W0058-1, Findings of Fact and Conclusions of Law ("Decision").

On March 17, 1997, Ms. Wagner filed an appeal with the Environmental Board.

On March 20, 1997, the Applicants filed a motion to dismiss the appeal ("Motion").

On March 21, 1997, Ms. Wagner filed a certificate of service.

II. PRELIMINARY RULING

Pursuant to Environmental Board Rule ("EBR") 16(B), the Chair may make such preliminary rulings as to party status and other procedural matters as are necessary to expedite and facilitate the hearing process. Any such ruling may be objected to by any interested party, in which case the ruling shall be reviewed and the matter resolved by the Board.

671

A. The Motion

The Applicants contend in their Motion that Ms. Wagner's appeal should be dismissed for three reasons. Motions to Dismiss are considered under EBR 18(D). The dismissal of the Motion is based on documents submitted to the Commission and Board pursuant to EBR 17(B). As explained below, the Motion is denied.

i. Timeliness of Appeal

Under 10 V.S.A. § 6089(a)(4) and EBR 40, a notice of appeal shall be filed with the Board within 30 days from the district commission's decision.

Under EBR 6, in computing any period time prescribed or allowed by Act 250 or the Board's rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless this day is a Saturday, Sunday, State legal holiday, or the day after Thanksgiving, in which event the period runs until the end of the next day which is not a Saturday, Sunday, State legal holiday, or the day after Thanksgiving.

The Commission issued the Permit and Decision on Thursday, February 13, 1997. The thirty day appeal period commenced on Friday, February 14, 1997. The thirtieth day was Saturday, March 15, 1997. Therefore, under EBR 6, Ms. Wagner had until the end of Monday, March 17, 1997 to file her appeal. Since Ms. Wagner did exactly this, her appeal is timely and the Motion is denied.

ii. Fee

Under EBR 1 l(C), all persons filing an appeal from a district commission decision shall pay a fee of \$50. The Board received a check in the amount of \$50 from Ms. Wagner on March 17, 1997. Accordingly, Ms. Wagner paid the fee required under EBR 1 l(C) and the Motion is denied.

iii. Statement of issue, summary of evidence, preliminary list of witnesses, statement of error, and certificate of service

Under 10 V.S.A. § 6089(a)(2), an appellant to the Board shall file with the notice of appeal a statement of the issues to be addressed in the appeal, a summary of the evidence that will be presented, and a preliminary list of witnesses who will testify on

behalf of the appellant. Under § 6089(a)(4), a notice of appeal shall be filed with the Board within 30 days.

In Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, Application #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Oct. 11, 1995), the Board denied a motion to dismiss based on an appellant's failure to include with the notice of appeal the items required under § 6089(a)(2). The Board stated:

[Section 6089(a)] contemplates that a notice of appeal must be filed within 30 days of the district commission's decision, and that three separate documents will accompany such notice: a statement of issues, a summary of evidence, and a preliminary list of witnesses. The clear intention of the required separate documents is to provide other parties with notice concerning the issues on appeal, and likely evidence and witnesses.

The Board concludes that the statute does not deprive the Board of jurisdiction to hear an appeal if one of the three separate, accompanying documents is not filed within 30 days. The Board also concludes that, if one or more of the accompanying documents is not filed, it may take such action as it deems appropriate, which may but does not necessarily include dismissal of the appeal.

Id at 4-5.

The Board's Savoie decision is consistent with Vermont Rule of Appellate Procedure 3(b) which provides that the failure of an appellant to take any step other than the filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which *may* include dismissal of the appeal. (Emphasis added.)

Effective January 2, 1996, EBR 40(A) provides, in part, that an appeal shall consist of the commission's decision; a statement of the reasons why the appellant believes the commission was in error; the issues to be addressed in the appeal; a summary of the evidence that will be presented; and a preliminary list of witnesses who will testify on behalf of the appellant. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the Board deems appropriate, which may include dismissal of the appeal. Thus, the Savoie decision has been incorporated into EBR 40(A).

Under EBR 40(B), the appellant shall send a copy of the notice of appeal by U.S. mail to all parties of right and all parties of record to the commission proceedings and shall file a certification of service with the Board at the time it files its appeal.

The Environmental Board has always liberally construed notices of appeal. The purpose of EBR 40 is to prompt appellants to focus their appeals and state the issues with reasonable specificity. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 5 (March 28, 1990). In Act 250 proceedings, once an Act 250 criterion is noticed for appeal, "issues generally within the scope of the criterion are properly before the Board." In re Taft Comers Associates, Inc., 160 Vt. 583590 (1993).

Under EBR 40(A), a notice of appeal must state the issues with *reasonable* specificity. Failure to specifically reference a criterion does not bar that provision from being an issue provided the notice of appeal discusses the subject matter covered by the particular provision with reasonable specificity. See In re Killington, Ltd., 159 Vt. 206, 215 (1992) (Board correctly considered the effect of the loss of wetlands under Criterion 8(A) notwithstanding that notice of appeal was limited to district commission's "findings and conclusions that the project would significantly impair necessary wildlife habitat").

Provided a notice of appeal references the applicable law and rules, or discusses the subject matter covered by the applicable law and rules with reasonable specificity, any issue generally within the scope of the notice of appeal is properly before the Board, and the scope is so limited, unless substantial inequity or injustice would result from such limitation. Re: Putney Paper Company, Inc., Solid Waste Certification #WH-600-WFP, Memorandum of Decision at 3 (Feb. 20, 1996).¹

The record before the Board is, in part, based on Ms. Wagner's March 17 appeal. As filed with the Board, the appeal contains the following documents:

1. **Cover** letter which states, in part, "[p]lease accept this as a request to

'The Chair notes that to ensure that the parties (and the Board) know exactly what the issues are, the Chair is empowered under EBR 16 to convene a prehearing conference to, in part, "[c]larify the issues in controversy." EBR 16(A)(1). The Chair's clarification of the issues ensures that all parties are given an adequate opportunity to prepare and respond to the issues raised in the proceeding. In re Vermont Health Service Corp., 155 Vt. 457,461 (1990).

appeal Case No. 3W0058-1 which was granted a Land Use Permit February 13, 1997 for Bruce Transportation.”

2. A document titled “Request to Appeal/or Obtain Party Status” which states, in part, that “I sent a letter to Julia Schmitz dated November 22, 1996 to request party status since the hearing was in recess. ...I believe I warrant party status since I am in the tourist business approximately 1 mile from the intended site. ... I note another instance where party status was granted for someone nearby but not an abutter in the case Killington Ltd 1992 159 Vt. 206,616, A 2d 241.”
3. A copy of the letter filed with the Commission on December 2, 1996, which states, in part, that, “We are not listed as a party to this application but would like to know if there is any way to reopen an application and admit other interested parties .. . Particularly I am sure that the 8-10 trips per day mentioned in the application is an invalid number since my calculations would suggest up to 100 passes through the driveway each day. ... in regard to question #7 of the hearing Recess Memorandum[,] I quote excerpts from our town plan: ‘Since communities exist primarily for the health, enjoyment, and use of those who live in them, it is appropriate that the nature and location of development be determined by the residents and not merely left to chance. ... Poorly sited or unsightly development can taint or obstruct key views.’ ... I question the ability of a septic system supposedly designed for a one bedroom house to be able to support the needs of 3 fulltime office employees, a mechanic ...”
4. A document titled “Issues and Criteria in Question” which identifies criteria 5(traffic), 8(aesthetics), and 10(town plan), and includes a discussion of the Commission’s findings under these criteria, and also states, “I question the Wastewater Disposal Permit #WW-3-0393 issued for 3 permanent employees when in fact I feel numerous employees driving the other Bruce Transportation buses will be dropping into the office on a regular bases.”
5. A document titled, “List of Evidence” which identifies evidence which is relevant to criteria l(B), 5, 8, and 10.
6. A copy of the Permit and Decision.

7. A certificate of service which states, in part, "that I have sent a copy of the Appeal Notice on March 17, 1997, by U.S. Mail, postage paid to the attached list of persons . . . Bruce Transportation Group, Inc., P.O.Box 416, Woodstock, Vt. 05091 ..."

On March 21, 1997, Ms. Wagner filed a certificate of service which states, in part, "that I have sent . . . [t]he additional required material as **discussed** (sic) with M's (sic) Wheeler was hand delivered to Mr. Chynoweth at the Bruce Trans. Woodstock office approx. 4:55pm 3-18-97[.]" This is also part of the record before the Board.

Based on the documents filed with the Board on March 17 and 21, the **only** possible instance of non-compliance with 10 V.S.A. §§ 6089(a)(2) and (4), and EBR 40(A) and (B), was providing the Applicants on March 18 with a copy of the documents she timely filed with Board on March 17. Ms. Wagner provided these documents to the Applicants one day after being instructed to do so by Board **staff**. Providing the copies to the Applicants on March 18 does not constitute the failure to fulfill a jurisdictional requirement. Rather, Ms. Wagner timely filed her notice of appeal, and the Applicants received all the supporting documents one day later. This is unlike those Board decisions where appeals have been dismissed since the notice of appeal was filed after the **thirty-day** deadline. See In re Town of Putney Interim Solid Waste Certification, No. 93-1 85, slip. op. (Vt. Sept. 22, 1993); Allen v. Vermont Employment Security Board, 133 Vt. 166 (1975); Re: Haystack Group, #700002-10-EB, Memorandum of Decision (March 29, 1989); Re Club 107, #3W0196-3-EB, Memorandum of Decision (Feb. 2, 1987); Re: Puppy Acres Boarding Kennel, #2W0568-2-EB, Memorandum of Decision (Oct. 11, 1985), aff'd, In re Puppy Acres Boarding Kennel, No. 85-490 (Vt. 1986).

Based on the above filings, and consistent with the precedent discussed above, Ms. Wagner's appeal complies with the filing requirements provided for in 10 V.S.A. §§ 6089(a)(2) and (4), and EBR 40(A) and (B). Accordingly, the Motion is denied.

B. Ms. Wagner's Appeal

Based on exhibit #29 which is part of the record before the Board, Ms. Wagner sought party status before the Commission under Criteria l(B), 5, 8, and 10. The Commission, however, did not rule on her party status request.

Under 10 V.S.A. § 6085(c)(l), parties to an application include such other persons as the Board may allow by rule.

Under 10 V.S.A. §6085(c)(2), a commission, according to the procedures established in the rules of the Board, shall determine party status with respect to individuals and organizations at the commencement of the hearing process and shall re-examine those determinations before the close of hearings and state the results of that re-examination of party status in the district commission decision.

Under EBR 14(B)(3)(c), a request for party status must be made to the commission on or before the first hearing day if a prehearing conference is not held and to the Board or commission on or before the day of the prehearing conference, if one is held, unless the Board or commission "finds that the petitioner has demonstrated good cause for failure to appear on time, and that its late appearance will not unfairly delay the proceedings or place an unfair burden on the applicant or other parties."

Under EBR 14(B)(C)(3), Ms. Wagner was required to have requested party status before the Commission on or before November 15. However, just because she requested party status on December 2, and reiterated the request on January 23, does not mean that Ms. Wagner must automatically be denied party status. Rather, before evaluating the merits of her party status request, the Commission should have decided as a threshold matter whether her request demonstrated good cause for failing to appear on time, and whether her late appearance would unfairly delay the proceedings or place an unfair burden on the applicant or other parties. See Re: Taft Corners Associates, Inc., #4C0696-11 -EB (Remand), Memorandum of Decision at 5 (May 5, 1995).

The Commission, however, made no ruling with regard to Ms. Wagner's December 2 party status request. Rules promulgated by an agency to govern its affairs have the force and effect of law. Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, Inc., 136 Vt. 213,216 (1978). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." In re Conway, 152 Vt. 526,529 (1989) citing to Morton v. Ruiz, 415 U.S. 199,235 (1974).

Under Act 250 the initial, **full** consideration of a permit application must be made before the district commission. This includes party status requests. In re Juster Associates, 136 Vt. 577,581 (1978). Under 10 V.S.A. § 6085(c)(2), the Commission was required to rule on Ms. Wagner's December 2 party status request since it was made prior to the Commission's February 13 adjournment. The Commission's failure to rule on Ms. Wagner's December 2 party status request is an abuse of its discretion to grant or deny party status under EBR 14(B). See In re Gallagher, 150 Vt. 50, 53.

Accordingly, this appeal shall be remanded back to the Commission. On remand, the Commission shall consider Ms. Wagner's December 2 party status request as of the time it was made. The Commission must first determine whether her request demonstrates good cause for failing to appear on time, and whether her late appearance would unfairly delay the proceedings or place an unfair burden on the applicant or other parties. If the Commission rules in Ms. Wagner's favor as to this threshold issue, then the Commission shall determine whether to grant her party status under Criteria 1(B), 5, 8, and 10.

III. ORDER

1. The Applicants' Motion to Dismiss is denied.
2. This appeal is remanded back to the District #3 Environmental Commission. On remand, the Commission shall consider Ms. Wagner's December 2 party status request as of the time it was made. The Commission must first determine whether her request demonstrates good cause for failing to appear on time, and whether her late appearance would unfairly delay the proceedings or place an unfair burden on the applicant or other parties. If the Commission rules in Ms. Wagner's favor as to this threshold issue, then the Commission shall determine whether to grant her party status under Criteria 1(B), 5, 8, and 10 pursuant to EBR 14(B)(1).
3. If the Commission denies Ms. Wagner party status, she may appeal **the** Commission's order pursuant to 10 V.S.A. § 6089 and EBR 40.
4. If the Commission grants Ms. Wagner party status, then it shall reconvene the hearing in this matter with respect to the criterion or criteria for which she is granted party status, and issue a new decision based upon the subsequent review.
5. Pursuant to Environmental Board Rule 16, any party who objects to this Order, in whole or part, shall file an objection with supporting memorandum of law on or before **Thursday, April 17, 1997**. If no objection is filed, then this Order shall become final.

Dated at Montpelier, Vermont this 2nd day of April, 1997

VERMONT ENVIRONMENTAL BOARD



John T. Ewing, Chair